

# Introduction

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## 1. The UCP Directive

In 2005, the EU Directive on Unfair Commercial Practices (referred to as the UCP Directive or the Directive) was adopted.<sup>1</sup> The UCP Directive, which evolved from its precursor, the Misleading and Comparative Advertising Directive,<sup>2</sup> has the ambitious aim of addressing unfair commercial practices directly related to distorting consumers' economic behaviour concerning transactional decisions.<sup>3</sup> Here, we give a brief overview of the scope of application and framework of the UCP Directive for the benefit of readers who are new to the subject; those readers well familiar with the UCP Directive may choose to move to Part 2.

The UCP Directive is a horizontal framework directive of a maximum harmonization nature. It has a very broad scope of application as it covers all business-to-consumer commercial practices in all sectors of economic activity.<sup>4</sup> Any business-to-consumer commercial practice before, during and after a

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1 Directive 2005/29 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Text with EEA relevance), *OJ* 2005 L 149/22 (hereafter: UCP directive).

2 Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, *OJ* 1984 L250/17, as amended by Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising to include comparative advertising, *OJ* 1997 L290/18. Further on the historical background of the UCP Directive, see J Stuyck, E Terry and T Van Dyck, 'Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 43 *Common Market L.Rev.* 107, 109 ff.

3 According to art 2(k) UCP Directive, 'transactional decision' denotes 'any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to the product, whether the consumer decides to act or to refrain from acting'.

4 Cf. H Collins, 'The Unfair Commercial Practices Directive' (2005) *ECLR* 417, 418.

transaction is covered by the Directive, thus including marketing, advertising, sales practices and after-sales conduct.<sup>5</sup>

It contains core provisions on unfair commercial practices, a black list of practices deemed unfair, and dedicated rules on various topics such as Codes of Conduct and the relationship with various information duties in other EU legislation. Moreover, the Directive contains provisions on enforcement.

The core of the Directive lies in the prohibition of practices contrary to the requirements of professional diligence which materially distort or are likely to materially distort the economic behaviour of the average consumer with regard to a product or a service.<sup>6</sup> Thus, unfair commercial practices consist of two elements: the (potential for) material distortion of consumers' transactional decision-making and the normative yardstick of professional diligence.<sup>7</sup> The notion of 'material distortion' is further defined as the impairment of the ability to make an informed decision, thereby causing the (average) consumer to take a transactional decision that he would not have taken otherwise.<sup>8</sup> The open-textured concept of 'professional diligence' refers to 'the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity'.<sup>9</sup>

In practice, however, the main general clause prohibiting unfair commercial practices may be less important than the two more concrete subcategories of *misleading* and *aggressive* practices. If a particular practice fits the description

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5 Art 2(d); art 3(1) UCP Directive.

6 Art 5 UCP Directive. Generally on the unfairness concept in the UCP Directive, see, e.g., B Keirsbilck, *The New European Law of Unfair Commercial Practices and Competition Law* (Oxford/Portland: Hart Publishing, 2011) 271 ff.; S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29. New Rules and New Techniques* (Studies of the Oxford Institute of European and Comparative Law, Oxford: Hart Publishing, 2006) 1 ff.; H-W Micklitz, 'The General Clause on Unfair Practices' in GG Howells, H-W Micklitz and T Wilhelmsson (eds), *European Fair Trading Law. The Unfair Commercial Practices Directive* (Aldershot: Ashgate, 2006) 83 ff.

7 In light of arts 6 and 9 UCP Directive, art 5 UCP Directive serves as a stand-alone 'safety net'. See European Commission, 'First Report on the Application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive")' (COM (2013) 139 final) (Brussels: European Commission, 2013) 12.

8 Art 2(e) UCP Directive.

9 Art 2(h) UCP Directive. On 'professional diligence', see, e.g., H Collins, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (2010) 73 *Modern Law Review* 98 ff.

of either of these two, there is no need to further test whether the practice is also unfair according to the main general clause of unfairness.<sup>10</sup>

Misleading practices are divided into two categories: misleading information and misleading omissions. *Misleading information* consists of those utterances which contain incorrect information and are therefore untruthful or which in any way deceive or are likely to deceive the average consumer, even if the information is factually correct. Such practices cause distortion of the transactional decision-making process of the average consumer in relation to aspects such as the existence or nature of the product, fitness for purpose, usage, quantity, specification, the price or the manner in which the price is calculated, or the need for a service, part, replacement or repair.<sup>11</sup>

*Misleading omissions* concern the practice of omitting or hiding material information – including the provision of such information in an unclear, unintelligible, ambiguous or untimely manner – which the average consumer needs, according to the context, to take an informed transactional decision and thus causing distortion of the transactional decision-making process of this average consumer.<sup>12</sup>

*Aggressive practices* involve actual harassment, coercion, the use of physical force, or the use of more subtle techniques involving undue influence such as exploitation of vulnerability or the use of obstacles discouraging consumers from asserting their rights.<sup>13</sup> For example, artificially raising barriers to exit from a contract or to the exercise of contractual rights may constitute an unfair commercial practice.<sup>14</sup>

Apart from these open-textured standards on ‘unfair’, ‘misleading’ and ‘aggressive’ practices, the UCP Directive also imposes specific prohibitions. Annex I to the Directive consists of a ‘black list’ of certain practices deemed unfair under any circumstances.<sup>15</sup> For example, a commercial practice ‘describing a product as “gratis”, “free”, “without charge” or similar, if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item’.<sup>16</sup> The same single list applies

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10 ECJ 19 September 2013, Case C-435/11 (*CHS Tour Services GmbH v Team4 Travel GmbH*).

11 Art 6(1) UCP Directive.

12 Art 7 UCP Directive.

13 Art 8 and 9 UCP Directive.

14 European Commission, ‘Commission Staff Working Document – Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices’ (SEC (2009) 1666) (Brussels: European Commission, 2009) 11.

15 See art 5(5) in conjunction with Annex I of the UCP Directive. The blacklisted practices are deemed unfair in the sense that no further evidence of unfairness, misleading or aggressive nature is required. On the relationship between the different categories, see, e.g., Stuyck, Terryyn and Van Dyck, 132 ff.

16 See Annex I, no 20 of the UCP Directive. Cf. ECJ 18 October 2012, Case C-428/11 (*Purely Creative Ltd and Ors v Office of Fair Trading*).

in all Member States and may only be modified by revision of this Directive. If a practice is listed, there is no need to assess whether it is contrary to the rules of professional diligence and whether it has materially distorted or would have been likely to materially distort the economic behaviour of the average consumer. If this list is not exhaustive of all unfair commercial practices,<sup>17</sup> it nonetheless lists exhaustively all the commercial practices presumed to be unfair.<sup>18</sup>

Apart from prohibitions of unfair commercial practices, the UCP Directive covers two further subjects aimed at introducing positive obligations and promoting fair commercial practices in the European Union. As far as the first aspect is concerned, the UCP Directive includes an obligation on traders to positively disclose certain information at a certain stage of the marketing and sales process. This obligation is incurred whenever traders make an ‘invitation to purchase’ to consumers.<sup>19</sup> The Directive lists a number of items on which traders need to positively disclose information when ‘inviting’ consumers to enter a commercial transaction, such as main characteristics and price.<sup>20</sup> As concerns the second aspect, the UCP Directive encourages the use of Codes of Conduct to support the dissemination of *fair* commercial practices. It does so, for example, by designating as misleading the practice of falsely claiming to be a signatory to a code of conduct as well as the practice of undertaking and publicly signalling to be bound by, while at the same time not complying with, firm commitments contained in a code of conduct.<sup>21</sup>

As mentioned, the UCP Directive follows the maximum harmonization principle. However, the Directive contains significant exceptions. Article 3(2) provides that the Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract (e.g., rules on fraud, mistake and misrepresentation). This is usually understood to be an exception in favour of national private law. Article 3(9) allows more restrictive national rules

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17 Art 5(5) read in conjunction with Recital 17.

18 A Garde, ‘The Unfair Commercial Practices Directive: A Successful Example of Legislative Harmonisation?’, in P Syrpis (ed.), *The Judiciary, the Legislature and the Internal Market* (Cambridge University Press, 2012) 118.

19 According to art 2(i) UCP Directive, an ‘invitation to purchase’ means a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase. Judging from ECJ 12 May 2011, C-122/10 (*Konsumentombudsmannen / Ving Sverige AB*), traders who advertise their products and services are well advised not to include a price reference in their advertisements since this may lead to the conclusion that they have made an ‘invitation’. Cf. *Commission Staff Working Document – Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices (SEC (2009) 1666)* 47 f.

20 See art 7(4) UCP Directive.

21 See Annex I(1) and art 6(2) (b) UCP Directive. See also art 10 UCP Directive which allows Member States to encourage code owners to exercise control on unfair commercial practices.

in the area of financial services. Thus, as far as financial services are concerned, the Directive is an instrument of minimum harmonization. Furthermore, in case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects (article 3[4]).

Finally, as far as enforcement is concerned, Member States are to implement the Directive and to choose adequate and effective means of combatting unfair commercial practices in the interest of consumers.<sup>22</sup> It is left to Member States to choose the exact form enforcement will take on their territories, as long as it offers persons and organizations having legitimate interest (including competitors) recourse to an administrative or judicial procedure.<sup>23</sup> Such procedures should at least offer the possibility of ordering the prohibition of imminent unfair practices and cessation of on-going practices.<sup>24</sup> Moreover, Member States shall lay down and enforce effective, proportionate and dissuasive penalties for infringements.<sup>25</sup>

## 2. Three Recurring Themes

The key issues that stand out include: the problematic nature of maximum harmonization by means of general clauses in an area as broad as that of commercial practices; the unpredictable influence on national private law doctrines such as contract, tort and even the practice of self-regulation; and the relative openness of the Directive in relation to both other forms of market regulation and the frameworks of enforcement at Member State level. Three topical and related issues deserve further analysis and have been given a prominent place throughout this volume. First, there is the tension between autonomy, empowerment and protection which can be sensed throughout the UCP Directive. Secondly, there is the problematic nature of the maximum harmonization principle. Thirdly, the ways in which the Directive is enforced at Member State level have given rise to a plethora of questions.

### 2.1 *Tension between Autonomy, Empowerment and Protection*

The core of the UCP Directive lies in the *information paradigm*: by assuring a flow of correct and meaningful information, transactional decisions of consumers are undistorted and can therefore be assumed to be taken in accordance with consumer preferences.<sup>26</sup> From this perspective, the UCP Directive is part and parcel of the

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22 Art 11(1) UCP Directive.

23 Art 11(1) UCP Directive.

24 Art 11(1) and (2) UCP Directive.

25 Art 13 UCP Directive.

26 The information paradigm is also apparent from the requirement under art 7(4) UCP Directive to provide certain material information prior to contracting. For additional and overlapping 'material information' requirements see art 5(1) of the Consumer Rights

classical economic framework of EU consumer policy. The UCP Directive, like so many rules of EU consumer law, is modelled around the average consumer. This elusive ‘average consumer’ is a non-existent model of human being, not a statistical average, which serves as a normative yardstick.<sup>27</sup> The framework thus assumes that consumers are rational choice actors who are ‘reasonably well informed and reasonably observant and circumspect’.<sup>28</sup>

That said, the UCP Directive does bear witness of the tension between the information paradigm aimed at bolstering autonomy and emphasizing individual responsibility on the one hand and protection of consumers generally and vulnerable groups in particular against repeat-players with superior knowledge on how consumers respond to certain commercial practices and how they can be encouraged, persuaded, seduced, bedazzled, pestered, overloaded and discouraged. The Directive aims at protecting consumers against unfair practices while on the other it underlines the individual’s responsibility by reference to the average consumer. According to the Court’s case law, the ‘reasonably well informed and reasonably observant and circumspect’ consumer can be expected to make a serious effort at collecting and understanding all available information on essential aspects of a contract.<sup>29</sup> So, the ‘average consumer’ is neither credulous, nor easily impressed nor quickly deceived. National courts applying this standard may find themselves offering less protection to consumers than they were used to under pre-existing national protective frameworks.<sup>30</sup>

On the other hand, the ‘model consumer’ who is confident and proactive in gathering and processing information before making transactional decisions is supplemented by the consumer who is particularly vulnerable ‘to the practice or the underlying product because of their mental or physical infirmity, age or credulity’.<sup>31</sup> Obviously, the question is what makes these groups vulnerable in connection with commercial practices. And are they the only ones prone to succumb to certain unfair practices? Given the human model of ‘homo heuristicus’ developed by behavioural economics, one could even argue that all consumers

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Directive 2011/83/EU. Obviously, the UCP Directive is also concerned with aggressive commercial practices.

27 *Commission Staff Working Document – Guidance on the Implementation/ Application of Directive 2005/29/EC on Unfair Commercial Practices (SEC (2009) 1666)* 28.

28 ECJ 16 July 1998, C-210/96 (*Gut Springenheide*).

29 ECJ 16 July 1998, C-210/96 (*Gut Springenheide*); ECJ 19 September 2006, C-356/04 (*Lidl and Colruyt*); cf. ECJ 6 July 1995, C-470/93, Jur. 1995 p. I-01923 (*Mars*).

30 On the damping effect of the UCP Directive on more protective legal systems, see eg., Stuyck, Terryn and Van Dyck, 134 ff.

31 Art 5(3). Cf. S Weatherill, ‘Who Is the “Average Consumer”?’ in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29. New Rules and New Techniques* (Oxford: Hart Publishing, 2006) 115 ff.; R Incardona and C Poncibò, ‘The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution’ (2007) 30 *Journal of Consumer Policy* 21, 21 ff.

are vulnerable individuals who merit some form of protection against traders who have superior knowledge on consumer behaviour and on how to make clever use of human deficiencies.<sup>32</sup>

It is sometimes said that consumers should take more responsibility for their decisions. For example, in discharging its duties, the Financial Conduct Authority (FCA), is under a duty to apply a number of principles including the principle ‘that consumers should take responsibility for their decisions’ (s. 3B FSMA 2000). This sounds stern; but what does that actually mean in markets where products are difficult to comprehend to begin with, are deliberately made even more complex, and where consumers are short-sighted, inert and/or literally or figuratively illiterate? The consequence of all this may be that national courts may feel restrained in offering redress to consumers according to the rather stern ‘homo economicus’ model underlying the UCP Directive. They may instead resort to national private law to provide fitting remedies when the UCP Directive turns out to be too ‘trader friendly’. A prime example of this is offered by a Dutch case. A retail bank who had designed and marketed inherently dangerous investment products to the general public was held liable on the basis of the (precursor to the) UCP Directive for producing a misleading prospectus. The Supreme Court held, in a nutshell, that in this case the EU Directive did not offer any solace. In essence, it ruled that the ‘homo economicus’ consumer should have been more cautious when reading the material:<sup>33</sup> ‘[...] it may be expected from a reasonably observant and circumspect consumer that he makes reasonable efforts in advance to comprehend the implications of the contract and its ensuing obligations and risks, and that he prudently considers endorsements, praise and examples.’ So, the Dutch Supreme Court did not consider this to be a case of misleading omission under EU rules. Yet, that was not the end of the case. The Court then switched to protection of the ‘homo heuristicus’ on the basis of national tort law. It ruled that the bank had neglected a duty to explicitly warn for inherent risks of the investment and to check suitability and affordability.<sup>34</sup>

So, the outcome apparently is that national private law may offer better protection for consumers than the UCP framework. Since the UCP Directive is

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32 The literature is abundant. We merely refer by means of example to CR Sunstein (ed.), *Behavioral Law and Economics* (Cambridge Series on Judgment and Decision Making, Cambridge: Cambridge University Press, 2000); RH Thaler and CR Sunstein, *Nudge – Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008); RB Korobkin and TS Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’ (2000) 88 *Cal. L. Rev.* 1051 ff. For a similar argument, see Stuyck, Terryn and Van Dyck, 121 f.

33 Dutch Supreme Court 5 June 2009, ECLI:NL:HR:2009:BH2815. Cf. WH van Boom, ‘The Netherlands’ in Civic Consulting (ed.), *Study on the Application of Directive 2005/29/EC on Unfair Commercial Practices in the EU / Part 2 – Country Reports* (Civic Consulting, Berlin, 2011) 7.1 ff.

34 Dutch Supreme Court 5 June 2009, ECLI:NL:HR:2009:BH2815.



without prejudice to contract law<sup>35</sup> – or perhaps even broader: private law? – at the Member State level there may be more than one track for disappointed consumers to follow.

## 2.2 Maximum Harmonization Principle

Subject to limited exceptions the UCP Directive is subject to the maximum harmonization principle.<sup>36</sup> The underlying rationale is that this guarantees a fair balance between traders' duties and consumers' rights, and creates legal certainty and a pan-European level playing field. However, the generic horizontal character of the Directive, combined with a broad-brushed scope, causes issues of demarcation. It is not entirely clear where the Directive begins and ends. Arguably, this is a problematic feature when combined with the maximum harmonization principle.

There are notable exceptions to the maximum harmonization principle which merit a brief overview. Moreover, the scope of the Directive is defined in such a way that in some respects or for some economic activities, the Directive does not stand in the way of more protective legislation at Member State level:

- *The UCP Directive is an instrument of minimum harmonization in the domains of financial services and immovable property.* By way of exception the UCP Directive is of a minimum harmonization character in these areas.<sup>37</sup> It was thought that the complexity and inherent serious risks surrounding these products and markets may require more detailed and tailored rulemaking at Member State level.<sup>38</sup> In its recent evaluation of the UCP Directive, the European Commission addresses the question whether article 3(9) UCP Directive merits repealing.<sup>39</sup> The Commission concludes that the exceptions to the maximum harmonization principle will be left unchanged.<sup>40</sup> Therefore, Member States will continue to be allowed to apply more stringent rules on commercial practices in the financial services domain.

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35 Art 3(2) UCP Directive provides that it is 'without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'.

36 Cf. Recital 14, 15, 5 UCP Directive.

37 Art 3(9) UCP Directive.

38 Recital (9).

39 Art 18 UCP Directive charges the EC with submitting a review of the experiences with the UCP Directive by 12 June 2011. The review was submitted in March 2013.

40 European Commission, 'First Report on the Application of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive")' (COM (2013) 139 final), Brussels 2013.



- *The UCP Directive does not harmonize contract law.* The Directive explicitly states that it ‘is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract’.<sup>41</sup> One may ask whether ‘contract law’ should not be read as ‘private law’ since some jurisdictions categorize pre-contractual duties or defectiveness of consent as part of tort law rather than contract law.<sup>42</sup>
- *Health and safety aspects.* The Directive itself more or less excludes rules relating to ‘the health and safety aspects of products’ from its scope by stating that the Directive is ‘without prejudice’ to such rules.<sup>43</sup> This seems to be a rather enigmatic exception since the Directive concerns the protection of informed and unintimidated transactional decision-making. If the exclusion of health and safety aspects of products is to be justified by the fact that such rules relate to the quality of products or by some motive to protect consumers against specific risks or against themselves, then surely more rules can be deemed excluded. For instance, should commercial practices concerning gambling not be explicitly excluded as well?<sup>44</sup>
- *Rules pertaining to regulated professions are outside the scope of the Directive.* So, national authorization regimes and establishment restrictions remain unaffected by the Directive.<sup>45</sup> Also, national requirements related to ‘taste and decency’ are considered to be outside the scope of the Directive.<sup>46</sup>
- *Scope of consumer protection.* The Directive aims at protecting consumers. This raises the question whether more restrictive national rules which may have a bearing on business-to-consumer relationships but in fact have a different goal (for instance, the protection of competitors) are affected by the Directive. One can think of restrictions of retail shops opening hours for the protection of employees and prohibition of Sunday trading for religious reasons. In *Pelckmans Turnhout*, the ECJ ruled that national provisions genuinely pursuing other objectives than consumer protection are outside the scope of the Directive.<sup>47</sup>

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41 Art 3(2) UCP Directive.

42 Cf. the German notion of liability for ‘culpa in contrahendo’ (§§ 311 [2] Bürgerliches Gesetzbuch) or the French liability for ‘fautes’ in precontractual dealings (art 1382 Code Civil).

43 Art 3(3) UCP Directive.

44 Note that Recital (9) of the Preamble to the UCP Directive suggests that regulation concerning gambling services remain unaffected by the Directive. This probably only follows if one underwrites to a broad interpretation of art 3(8) UCP Directive so as to include any regulatory regime setting quality standards or prohibiting certain practices. Admittedly, if one accepts such a broad construction of ‘any conditions of establishment or of authorisation regimes imposed on professionals’ then the UCP Directive as a whole is effectively neutralized by regulatory regimes at Member State level.

45 Art 3(8) UCP Directive.

46 See Recital 7 Preamble UCP Directive.

47 ECJ 4 October 2012, C-559/11, *Pelckmans Turnhout NV v Walter Van Gastel Balen et al.* Note that the ECJ queries whether the objectives are ‘related’ to consumer

- *Collisions with other EU rules.* In case of conflicting rules, the Directive gives way to those specific rules.<sup>48</sup> For instance, where a dedicated EU regulation sets particular rules on information disclosure in the online sales of airline tickets which are more specific and stricter than the UCP Directive rules on pre-contractual information duties, these special rules have priority. This is also the case where these specific EU rules are of a minimum harmonization character.

Leaving these exceptions aside, the scope of the maximum harmonization nature of the Directive is contested. The dominant position seems to be that the Directive does not allow categorical prohibitions of certain practices if and to the extent that such national prohibitions aim at consumer protection. This would interfere with the Directive's all-encompassing scope of maximum harmonization, or so the ECJ holds. In fact, the ECJ has ruled that a national regime generally prohibiting combined offers is incompatible with the UCP Directive. Likewise, a general prohibition of practices making the participation in a prize competition or lottery conditional on the purchase of goods is incompatible with the UCP Directive.<sup>49</sup> The same applies to general prohibitions of sales with bonuses,<sup>50</sup> general prohibitions of advertising upcoming sales in a particular period<sup>51</sup> or without authorization.<sup>52</sup> Note that while general prohibitions are not allowed, there can be good reasons to intervene in particular cases where a promotional offer or other marketing technique contravenes the standards for misleading, aggressive or otherwise unfair commercial practices. This would, however, require individual assessment in light of the given circumstances, which is significantly different from an unconditional and general ban on certain practices.

The upshot of all this is that Member States cannot administer their own national 'black lists'. The Annex is exhaustive. The basic idea of an exhaustive black list was justified with the argument that 'it was essential to overcome the

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protection, which may a broader and more factual test than the mere enquiry into the aims of the national provisions. See also recital (6) of preamble to the UCP Directive, which states that the Directive "[...] neither covers nor affects the national laws on unfair commercial practices which harm *only* competitors' economic interests or which relate to a transaction between traders" (emphasis added, eds).

48 ECJ 23 April 2009, C-261/07 and C-299/07 (*VTB–VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV*). In a similar vein ECJ 11 March 2010, C-522/08 (*Telekomunikacja Polska*).

49 ECJ 14 January 2010, C-304/08 (*Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*).

50 ECJ 9 November 2010, Case C-540/08 (*Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG v 'Österreich'–Zeitungsverlag GmbH*).

51 ECJ 15 December 2011, C-288/10 (*Wamo BVBA v JBC NV and Modemakers Fashion NV*) and ECJ 11 December 2011, C-126/11 (*Inno NV v Unizo and others*).

52 ECJ 17 January 2013, C-206/11 (*Köck v Schutzverband gegen unlauteren Wettbewerb*).

specific legal barriers caused by the fragmented regulation of unfair commercial practices, which gave rise to cost, complexity and uncertainty for both businesses and consumers.’<sup>53</sup> However, it is debatable whether having a fixed list at the EU level without any room for considering ‘local practices’ that may merit similar outright banning is the most efficient way of dealing with unfair commercial practices in Europe. Responding to national incidents by amending rules and thus prohibiting certain unfair practices at a national level to curb excesses can be part of a rational, devolved policy-making process. By pre-empting legislative intervention at the Member State level, national ‘black lists’ have been rendered impossible and so have the national legislative policies targeting ‘local’ unfair practices. What remains, is the aspiration of maximum harmonization by means of a combination of a European black list and general clauses on misleading, aggressive and unfair commercial practices broadly defined. As will be shown throughout this volume, it remains to be seen whether this aspiration, supported by the EU ‘mantra’ of increasing legal certainty for both consumers and businesses through maximum harmonization,<sup>54</sup> is realistically attainable in this area.<sup>55</sup>

### 2.3 Enforcement

Member States are supposed to have implemented the UCP Directive by 12 June 2007.<sup>56</sup> The range of techniques applied by Member States in implementing the UCP Directive differs vastly.<sup>57</sup> In the United Kingdom, the Directive was implemented through the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277).<sup>58</sup> The legal embedding of the Directive in the United

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53 (COM (2013) 139 final) 4.

54 See, e.g., Recital (12).

55 Cf. Stuyck, Terryn and Van Dyck, 148; B Keirsbilck, ‘Towards A Single Regulatory Framework on Unfair Commercial Practices?’ (2009) *EBLR* 507, 509.

56 Art 19 UCP Directive. The measures shall be applied by 12 December 2007. Until 12 June 2013, Member States are allowed under specific conditions to continue to apply ‘national provisions within the field approximated by this Directive which are more restrictive or prescriptive than this Directive and which implement directives containing minimum harmonisation clauses’ (art 3(5) UCP Directive).

57 Generally on the differences in enforcement style and culture in consumer law, see the contributions to WH van Boom and MBM Loos (eds), *Collective Enforcement of Consumer Law – Securing Compliance in Europe through Private Group Action and Public Authority Intervention* (European Studies in Private Law, Groningen: Europa Law Publishing, 2007).

58 In the United Kingdom, administrative enforcement powers are assigned to the Competition and Markets Authority (CMA; formerly: OFT) and the local Trading Standards authorities. See Consumer Protection from Unfair Trading Regulations 2008 as amended by the Public Bodies (The Office of Fair Trading Transfer of Consumer Advice Scheme Function and Modification of Enforcement Functions) Order 2013. Enforcement in the financial services domain is the responsibility of the FCA. See S. 213 Enterprise Act 2002 as amended by s. 95 Financial Services Act 2012.

Kingdom is such that originally individual consumers were not entitled to redress on the basis of the Regulations, nor are their contracts directly affected. Instead, enforcement is largely achieved by administrative enforcement orders and criminal law sanctions.<sup>59</sup> However, the amendment of the Consumer Protection from Unfair Trading Regulations 2008, which is currently underway, will introduce under specified conditions individual rights of redress for consumers (i.e., the right to unwind, the right to a discount and a right to damages).<sup>60</sup>

In Germany, where there is a rich legislative tradition of prohibiting unfair commercial practices as part of competition law, the UCP Directive was implemented by means of amendment of the pre-existing framework of the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb; UWG). The German enforcement model traditionally relies on private actions for injunction initiated by representative organizations although recently a public authority was assigned the task to address cross-border unfair commercial practices.<sup>61</sup> Essentially, the German enforcement model relies on private law rather than criminal law remedies.<sup>62</sup>

By contrast, in the Netherlands implementation measures include implementing a tort of unfair commercial practices in the Civil Code supplemented by administrative law fining powers and enforcement orders. Here, the emphasis is on a two-track system of individual and representative civil litigation on the one hand and administrative law enforcement on the other. In Dutch practice, however, the role of sophisticated self-regulation to distinguish reputable traders from rogue traders plays an important 'soft-law enforcement role' as well.<sup>63</sup>

These few examples show some of the differences in enforcement culture at Member State level. In particular, the Member States are left to decide whether the concept of unfair commercial practices is introduced in private law and consequentially whether private law remedies are available to individual consumers.<sup>64</sup>

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59 *McGuffick v Royal Bank of Scotland plc* (2009) EWHC 2386 (Comm). Cf. Enterprise Act 2002, Part 8 (Enforcement of certain consumer legislation). See also L Fox O'Mahony, *Home Equity and Ageing Owners – Between Risk and Regulation* (Oxford: Hart Publishing, 2012) 259; Collins, 111 ff.

60 Consumer Protection from Unfair Trading (Amendment) Regulations 2013 (draft regulations).

61 See the Consumer Protection and Food Safety Authority Act 2002 (Gesetz über die Errichtung eines Bundesamtes für Verbraucherschutz und Lebensmittelsicherheit [BVL-Gesetz-BVLG]).

62 Yet, the UWG does penalize certain infringements; see §16–19 UWG.

63 See further van Boom para 7.1 ff.

64 See G De Cristofaro, 'Die zivilrechtlichen Folgen des Verstoszes gegen das Verbot unlauterer Geschäftspraktiken: eine vergleichende Analyse der Lösungen der EU-Mitgliedstaaten' (2010) *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (GRUR Int) 1017, for an overview of choices made by Member States.

The lack of uniformity in the choice of enforcement framework is obviously the result of the leeway left by the Directive to Member States. As long as the national framework sanctions infringements effectively, proportionately and dissuasively,<sup>65</sup> and offers individuals, businesses and interested organizations recourse to an administrative or judicial procedure concerning prohibition and stopping orders,<sup>66</sup> the obligations under the UCP Directive are satisfied. Understandably, the result of this application of the principle of national procedural autonomy is the continued existence of differences in enforcement framework, style and culture across the Member States. Hence, it may not come as a surprise that in its recent report on the application of the UCP Directive, the European Commission mainly considers pathways towards strengthening enforcement activities at member state level and for cross-border practices.<sup>67</sup>

### 3. The Contributions Gathered in This Collection

Having briefly introduced the three themes that are woven into the fabric of the contributions to this book, we can now summarize the various chapters and see how they interrelate. The book is roughly divided into four parts.

#### *3.1 Implementation, Approximation and Harmonization*

Part I deals with issues of implementation, approximation and harmonization. As noted earlier, the maximum harmonization nature of the UCP Directive and the exceptions to its scope raise particular issues of convergence and divergence of national legal systems. For instance, in what areas does the UCP Directive leave room for manoeuvring? In what ways does the UCP Directive cause frictions with domestic law? Does it conflict with other areas of EU and domestic consumer law?

In their contribution 'UK Implementation of the Unfair Commercial Practices Directive', Marios Koutsias and Chris Willett take some of these issues as a starting point to discuss the UK experience with the UCP Directive. Their analysis shows that while the traditional UK approach was one of criminal enforcement, the developments surrounding the implementation of the UCP Directive have prompted a blending of this traditional approach with a seemingly more European enforcement approach which stresses preventive techniques. In other respects, the authors argue, the process of 'Europeanization' through the UCP Directive has started to influence fairness concepts in the domestic regulatory landscape and perhaps even in private law. As concerns the substantive reach of the Directive, Koutsias and Willett also predict that the regulation of commercial practices in the financial services industry will largely remain outside the maximum harmonization

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65 Art 13 UCP Directive.

66 Art 11(1) and (2) UCP Directive.

67 COM (2013) 139 final.

principle and hence within the national legislative realm. The ‘home grown’ financial services regime is likely to remain dominant, they convincingly argue.

Bert Keirsbilck devotes his contribution ‘Pre-emption of National Prohibitions of Sale Below Cost: Some Reflections on EU Law Between Past and Future’ to the troublesome pre-emptive effect of the maximum harmonization principle underlying the Directive. As mentioned earlier, the fact that the Directive moves well into border territories of generic market regulation raises numerous issues of demarcation. For instance, national prohibitions of sales below cost obviously affect consumers but are usually also aimed – or even primarily or exclusively aimed – at some sort of protected competition. To what extent do such market design rules clash with the UCP Directive? Keirsbilck focuses on the viability of national prohibitions of sales below cost in light of European law. He argues that the maximum harmonization principle underlying the Directive forbids national prohibitions of business-to-consumer sales below cost in so far as such prohibitions pursue consumer protection objectives.

In her contribution ‘The Blacklist of Unfair Commercial Practices: The Black Sheep, Red Herring or White Elephant of the Unfair Commercial Practices Directive?’, Monika Namysłowska focuses specifically on the Black List in Annex I to the UCP Directive, which bans 31 particular commercial practices. Although the introduction of a Black List was aimed at increasing legal certainty and consumer confidence, one may wonder whether this aim has been achieved. Some of the prohibitions encapsulated in the List are difficult to apply; others are in fact rather vague and open-textured creating uncertainty instead. Moreover, given the maximum harmonization principle the Black Lists pre-empts any legislative attempts at the Member State level to introduce, amend or extend the listed practices. Namysłowska argues that the various national methods of implementation of Annex I and the dissimilar notions and legal definitions at the Member State level add to the complexity of the UCP Directive regime, render uniform interpretation difficult and may even hinder effective enforcement.

### *3.2 Vulnerability*

Part II of this volume deals with vulnerability issues. The UCP Directive is slightly ambiguous as concerns vulnerability due to age, mental or physical condition. On the one hand, the Directive assumes consumers to be ‘reasonably well informed and reasonably observant and circumspect’.<sup>68</sup> Therefore, the ‘model consumer’ is considered to be confident and proactive in gathering and processing information before making transactional decisions. On the other hand, however, the Directive seems to offer specific protection to old, young, disabled and challenged consumers. Obviously, the question is what makes these groups vulnerable in connection with commercial practices. And are they the only ones prone to succumb to certain unfair practices? Given the human model of ‘homo heuristicus’ developed by

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68 Cf. art 5(2) UCP Directive.

behavioural economics, one could even argue that all consumers are vulnerable individuals.

Against this background Marine Friant-Perrot discusses ‘The Vulnerable Consumer in the UCPD and Other Provisions of EU Law’. She argues that the concept of vulnerability is multi-faceted and in fact covers different realities. Vulnerability may even consist of the lack of opportunities to access certain – essential or non-essential – services and goods. As Friant-Perrot shows, consumer vulnerability is widespread and as such needs to be taken into account when judging both the unfairness of commercial practices and the hazardous nature or suitability of certain goods and services.

### *3.3 The UCP Directive and Other Regimes*

In Part III, the interaction between the UCP Directive regime with other forms of regulation of traders’ behaviour is discussed. How does the UCP Directive relate to other EU rules of consumer protection? Does it complement or interfere with other regimes – be they legislative, regulatory or self-regulatory?

In her contribution, ‘Can the UCP Directive Really Be a Vector of Legal Certainty?’, Amandine Garde focuses on the extent to which the objective of legal certainty, which is strongly enshrined in the UCP Directive, can realistically be attained. She argues that if the UCP Directive may inject a degree of certainty into the EU regulatory framework, largely through its Annex of black-listed practices, the use of extremely broad, loosely defined concepts in the Directive’s general clauses is unlikely to promote the level-playing field promised by the Commission to traders, consumers and Member States alike. The second part of the contribution focuses more specifically on the uneasy relationship existing between the UCP Directive and other provisions of EU law. In particular, it evaluates how the horizontal provisions of the UCP Directive relate to more specific provisions intended to refine the notions of misleading and unfair practices in specific sectors of the EU economy or in relation to specific business-to-consumer commercial practices. Overall, this contribution concludes that fine lines will have to be drawn to determine which practices fall within and which practices fall outside the scope of the UCP Directive and that difficult questions remain regarding the extent to which Member States still benefit, notwithstanding the maximum harmonization clause contained in the Directive, from a margin of autonomy to protect consumers from unfair commercial practices on their territories.

The contribution ‘The Interaction between the Unfair Commercial Practices Directive and Self-Regulation: The Case of Codes of Conduct’ by Charlotte Pavillon offers an in-depth analysis of the relationship between the UCP Directive and self-regulatory quality enhancement through voluntary codes of conduct. Pavillon shows that although the Directive seems to encourage the use of such codes, in practice such codes seldom extend or build on the Directive’s general fairness clause and neither do they advance the Directive’s pan-European harmonization aspirations. Pavillon therefore argues that ideally the Directive is



to be amended so as to strengthen the contribution of codes of conduct to the standards laid down in the Directive while preserving the right balance between consumers' and traders' interests.

In his contribution 'A Common Approach to the Enforcement of Unfair Commercial Practices and Unfair Contract Terms', Hans Micklitz proposes that a more coordinated approach is taken in relation to unfair commercial practices and unfair contract terms. EU Member States tend to consider these two phenomena separate and distinct. Traditionally, the framework for tackling unfair commercial practices is primarily geared towards the regulation of markets and competition whereas unfair terms legislation is mostly concerned with substantive standards of protection in contract law. However, Micklitz shows that the worlds of unfair commercial practices and unfair contract terms are not as far apart as one might think and that in line with recent trends in ECJ case law a convergent approach to both fields of law is appropriate. If one looks at the UCP Directive, however, one will notice its wide scope. Thus, the assessment of the fairness of contract terms may quickly turn out to overlap with the UCP regime. Using unfair terms may mystify the consumer's legal position and may thus become misleading as a practice rather than as a term.

### 3.4 Enforcement Issues

Finally, in Part IV various issues of enforcement come to the fore. In principle, The UCP Directive leaves it to Member States to decide on the enforcement architecture. The result is a plethora of instruments across the European Union, each with their advantages and drawbacks. What lessons can be learned from the various choices made by Member States? Recently, the European Commission communicated its first report on the application of the Directive. The gist of the report is that the UCP Directive itself is adequate as it stands but that enforcement efforts need to be intensified.<sup>69</sup> This is all the more reason to delve deeper into the enforcement issues.

Franziska Weber writes on 'Law and Economics of Enforcing Misleading Advertising Laws: Incentives of Bona and Mala Fide Traders Assessed'. As the title suggests, this is a law and economics analysis of misleading advertising. The harm caused to society by such unfair commercial practices is exacerbated by the fact that enforcement efforts are non-existent, slow or ineffective. Weber argues that the law should try to distinguish between *bona fide* traders and *mala fide* traders. While the latter inadvertently breach the law, rogue traders' interests lie in the short-term profit generated by their illegal activities. Since the UCP Directive leaves national legislatures with considerable discretion regarding the choice of enforcement tools and the national configuration of the various institutions and enforcers differs, the question is how Member States may design an efficient enforcement framework. Weber tries to answer why no one-size-fits-all solution is

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69 (COM (2013) 139 final).

available for all European Member States and how national legislatures may take certain design requirements into account when devising their national frameworks.

In the final contribution to this section, Dörte Poelzig poses the question ‘Private or Public Enforcement of the UCP Directive? Sanctions and Remedies to Prevent Unfair Commercial Practices’. The various national enforcement strategies are reviewed. Poelzig surveys the main divide between Member States relying on public enforcement – using criminal law or administrative law – and those taking private law enforcement as a starting point. Given the need to ensure the full effectiveness of the UCP Directive, Poelzig argues that it is essential to establish a level playing field of effective enforcement and to identify the comparative strengths and weaknesses of the various available instruments.

#### 4. Outlook

This volume addresses some of the practical concerns which have arisen since the UCP Directive entered into force. It assesses whether the difficulties which were anticipated in earlier academic writings have in fact materialized and what unexpected issues have arisen since. In doing so, it takes stock of the various policy developments, the growing body of case law developed both by the CJEU and by national courts, the decisions of relevant national enforcement authorities, as well as the legislative debates which have surrounded the implementation of the UCP Directive in Member States. If anything, the contributions to this book bear witness of the complexity of the field of commercial practices and the multitude of issues that deserve further research.

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